

Rainbow Exh —

ORAL ARGUMENT SCHEDULED
APRIL 17, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

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No. 94-1439

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

PRESS BROADCASTING COMPANY, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

RAINBOW BROADCASTING, LTD.,
Intervenor.

ON APPEAL FROM AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

STATEMENT OF ISSUES PRESENTED

In June 1991, Rainbow Broadcasting Company ("Rainbow") asked the Federal Communications Commission for an extension of time to construct a television station in Orlando, Florida. Press Broadcasting Company, Inc. ("Press"), the licensee of another television station in the Orlando area, opposed Rainbow's extension request. While Rainbow's extension application was pending, representatives of Rainbow made ex parte presentations to employees of the Commission's Mass Media Bureau. Almost immediately after Press complained to the Commission that Rainbow's ex parte contacts violated FCC rules, the Bureau voluntarily recused itself from further involvement in this proceeding.

(1)

Federal Communications Commission

Docket No. GC 95-172 Exhibit No. 12

Presented by Rainbow Broadcasting

Disposition	}	Identified <u>X</u>
		Received _____
		Rejected <u>X</u>

Reporter YLS

Date 6-28-96

requirements of 47 C.F.R. § 73.3534.³³ The Commission reasonably granted Rainbow a 12-month extension "in order to give Rainbow the full 24-month period that initial construction permittees are ordinarily accorded." Order, 9 FCC Rcd at 2847 (¶ 40) (J.A. 9). The Court should uphold the Commission's reasonable decision to grant Rainbow an extension.

IV. THE COMMISSION CORRECTLY FOUND THAT
PRESS DID NOT RAISE ANY SUBSTANTIAL
AND MATERIAL QUESTION OF FACT THAT
WARRANTED A HEARING.

If a party raises a substantial and material question of fact as to whether the grant of a broadcast station application would serve the public interest, the Communications Act requires the Commission to hold a formal hearing on the question. 47 U.S.C. §§ 309(d)-(e). By contrast, if the Commission finds that there are no substantial and material questions of fact and that grant of the application will further the public interest, the Act directs the Commission to grant the application without holding a hearing. 47 U.S.C. § 309(d)(2).³⁴ In this proceeding, the Commission properly found no need to conduct a hearing because Press failed to raise any substantial and material question of fact concerning Rainbow's qualifications.

³³ For this reason, the FCC cases cited by Press at the bottom of page 31 of its brief are inapposite. All of those cases involved applicants who had already received an authorized construction period (free of any legal challenge) of at least 24 months.

³⁴ See also Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988); Gencom, Inc. v. FCC, 832 F.2d 171, 180-83 (D.C. Cir. 1987).

On appeal, Press contends that it raised three factual questions that warranted a hearing. First, even though the OIG -- after interviewing Rainbow's attorney -- determined that Rainbow sincerely believed its ex parte presentations were proper, Press claims that the Commission should have further inquired into the sincerity of Rainbow's belief. Br. 40-41. But Press appears to concede that such a hearing would be unnecessary if Rainbow held a sincere belief "about a disputed point of regulatory law as to which no guidance has been given by the agency." Br. 40. And that is precisely what happened here. As we explained above at pages 30-31, the Commission had to address an issue of first impression before determining that Rainbow's ex parte contacts were improper. In light of the uncertainty about the applicability of the ex parte rules to this proceeding, there is no substantial factual question that Rainbow sincerely believed its ex parte contacts were permissible.

Second, Press argues that the Commission should have held a hearing on whether Rainbow made misrepresentations in its January 1991 extension application. In particular, Press contends that Rainbow falsely ascribed its inability to complete construction to its dispute with the owner of its broadcast tower. Br. 41. While Rainbow stated in its January 1991 application that the tower dispute "delayed" construction, the Commission reasonably concluded: "Rainbow did not, however, represent to the Commission that the tower dispute precluded it from constructing." Order, 9 FCC Rcd at 2847 (¶ 43) (J.A. 9) (emphasis added). Indeed, in the FCC application forms that accompanied both its fifth and sixth extension requests, "Rainbow

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consistently stated that, irrespective of the tower dispute, it would complete construction by December 31, 1992." Id.

Consequently, the Commission properly determined that "a substantial and material question has not been raised that Rainbow made misrepresentations to the Commission." Id.

Finally, Press contends that it raised a substantial and material question of fact with respect to Rainbow's financial qualifications. Br. 41-43. In asserting that Rainbow is not financially qualified, Press relies on the findings of a district court that Rainbow could not obtain a preliminary injunction in the tower dispute because, inter alia, it had not arranged financing for its station and could not therefore demonstrate irreparable harm. See Rey v. Guy Gannett Publishing Co., 766 F. Supp. 1142, 1148 (S.D. Fla. 1991). The district court's finding, however, was based on testimony that represented predictive judgments about Rainbow's ability to maintain its existing financing arrangements if Press were permitted to broadcast from the tower. See Press Informal Objection and Request to Hold Application in Abeyance, January 7, 1992, Attachment A (J.A. 150-161).

Moreover, the Commission observed that neither those predictive judgments nor the district court's ruling on Rainbow's motion for preliminary injunction

were intended to address the entirely different question of whether Rainbow continued to meet our financial qualifications standard. That standard provides that applicants must demonstrate sufficient capital to construct the station and then operate for 90 days without advertising or other broadcast revenue.

Order, 9 FCC Rcd at 2848 (¶ 47) (J.A. 10) (emphasis in original) (citing 47 C.F.R. § 73.4111 and Financial Qualifications Standards, 72 FCC 2d 784 (1979)). The Commission found no evidence that Rainbow had failed to satisfy the FCC's financial qualifications standard at any time during the pendency of Rainbow's application: "Indeed, to the contrary, Rainbow's completion of construction would appear to belie the assertion that its financial qualifications under our rules [are] in question." Order, 9 FCC Rcd at 2848 (¶ 47) (J.A. 10).³⁵ Consequently, the Commission properly determined that Press had not made a prima facie case that Rainbow lacked the necessary financial qualifications.

Press has failed to present this Court with a single factual issue that would have justified a hearing in this proceeding. The Court should affirm the Commission's proper decision to grant Rainbow's extension and assignment applications without holding a hearing.

³⁵ Press erroneously asserts that Rainbow tacitly admitted in April 1993 that it was not financially qualified "absent FCC consent to its pending Assignment Application." Br. 42. To the contrary, while Rainbow urged the Commission to approve the assignment application, one of Rainbow's general partners expressly informed the Commission in April 1993 that Rainbow was prepared to "go back to its lenders for a reaffirmation of their commitments" if the assignment application was denied. Letter from Margot Polivy, Counsel for Rainbow, to Clay Pendarvis, FCC, April 12, 1993, Attached Statement of Joseph Rey at 2 (J.A. 173). Thus, even if the Commission had rejected Rainbow's limited partnership proposal, Rainbow had indicated its willingness to proceed with construction under its original financing plan.

CONCLUSION

For the foregoing reasons, the Court should affirm the Commission's Order in this proceeding.

Respectfully submitted,

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January 26, 1995